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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 668

CLAY RICE, ET AL.,
Petitioners,

v.

GEORGE ELMORE, ON BEHALF OF HIMSELF AND OTHERS SIMILARLY SITUATED,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATEMENT OF THE CASE

Petitioners in their petition and brief have correctly cited the case below and have properly indicated the basis for jurisdiction. In their statement of facts, however, they have omitted certain matters.

As the court below found:

> "For half a century or more the Democratic Party has absolutely controlled the choice of elective officers in the State of South Carolina. The real elections within that state have been contests within the Democratic Party, the general elections serving only to ratify and give legal validity to the party choice. So well has this been recognized that only a comparatively few persons participate in the general elections. In the election of 1946, for instance, 290,223 votes were cast for Governor in the Democratic primary, only 23,326 in the general election." (R. 115)

Despite the fact that in 1944 the General Assembly of South Carolina repealed all existing statutes which contained any reference directly or indirectly to primary elections within the state, the District Judge expressly found:

> "In 1944 substantially the same process was gone through, although at that time and before the State Convention assembled, the statutes had been repealed by action of the General Assembly, heretofore set out. The State Convention that year adopted a complete new set of rules and regulations, these however embodying practically all of the provisions of the repealed statutes. Some minor changes were made but these amounted to very little more than the usual change of procedure in detail from year to year. * * * (R. 94)
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> "In 1946 substantially the same procedure was used in the organization of the Democratic Party and another set of rules adopted which were substantially the same as the 1944 rules, excepting that the voting age was lowered to 18 and party officials were allowed the option of using voting machines, and the rules relative to absentee voting were simplified * * *." (R. 95)

REASONS FOR DENYING THE PETITION

When the courts below upheld the right of respondent, a qualified elector, to participate in the choice of congressmen in South Carolina, they properly applied the relevant provisions of the Constitution and laws of the United States as construed by this Court. They readily and rightly recognized that the question was one which has already been "settled by this court * * *." Therefore, we submit, the petition for writ of certiorari should be denied.

This Court pointed out in *United States* v. *Classic*, 313 U. S. 299, 314, that ever since *Ex parte Yarbrough*, 110 U. S. 651, it has uniformly held that under Article I, Sec. 2 of the Constitution the right to choose congressmen "is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."

This Court made it equally plain in the *Classic* case that the constitutional protection of the right to vote extended to certain primary elections when it said:

> "*Where the state law has made the primary an integral part of the procedure of choice, or where in fact the primary effectively controls the choice, the right of the elector to have his ballot counted at the primary is likewise included in the right protected by Article I, Sec. 2.* And this right of participation is protected just as is the right to vote at the election, where the primary is by law made an integral part of the election machinery, whether the voter exercises his right in a party primary which invariably, sometimes or never determines the ultimate choice of the representative. *Here, even apart from the circumstance that the Louisiana primary is made by law an integral part of the procedure of choice, the right to choose a representative is in fact controlled by the primary because, as is alleged in the indictment, the choice of candidates at the Democratic primary determines the choice of the elected representative.* Moreover, we cannot close our eyes to the fact, already mentioned, that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the general election, even though there is no effective legal prohibition upon the rejection at the election of the choice made at the primary, and may thus operate to deprive the voter of his constitutional right of choice." (313 U. S. 299, 318-319.) Italics supplied.

The record in the instant case shows, without dispute, that the Democratic primary in South Carolina "effectively controls the choice" of congressmen and has done so for nearly fifty years (R. 103-104). Equally clearly the record shows that petitioners prevented respondent, and others similarly situated, solely on account of his race and color, from exercising his constitutional right to participate in the choice of congressmen in the 1946 Democratic primary.

This Court held in the *Classic* case that Secs. 19 and 20 of the Cirminal Code (Title 18 Secs. 51 and 52) provided crim-

inal sanctions for interference with the right to vote in the Louisiana primary. We submit that the courts below rightly held that Title 8, Secs. 31 and 43 and the provisions of Title 28, Secs. 41 (1), (11), (14), and 400 similarly afford respondent a civil remedy in the federal courts for deprivation of his right to vote in the South Carolina primary.

In support of their plea for certiorari petitioners claim, primarily, that there was no "state action" here. Even accepting that assumption *arguendo* and only for the moment, this neither justifies petitioners' interference with respondent's right to vote nor does it require this Court to review the decision below. In the *Classic* case, *supra,* this Court was explicit on the point. There it was said:

> Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. This Court has consistently held that this is a right secured by the Constitution. *Ex parte Yarbrough, supra; Wiley* v. *Sinkler, supra; Swafford* v. *Templeton, supra; United States* v. *Moseley, supra;* see *Ex parte Siebold, supra; In re Coy,* 127 U. S. 731; *Logan* v. *United States,* 144 U. S. 263. And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of individuals as well as of states. *Ex parte Yarbrough, supra; Logan* v. *United States, supra.* (313 U. S. 299, 315.)

Thus it appears to be well settled by the decisions of this Court that the paramount right of a free people to choose those persons to whom the powers of government are to be entrusted is protected by the Constitution from interference by individuals as well as by states. Petitioners take nothing by their claim that their actions were done pursuant to the "rules" of a "voluntary political association." They deliberately and admittedly so acted as to prevent qualified electors from exercising their constitutional right to vote. The courts below, then, followed the decisions of this Court

in holding that the petitioners thus violated the Constitution and laws of the United States.

Petitioners confuse the rights protected by Article I, Sec. 2 of the Constitution with those protected by the Fourteenth and Fifteenth Amendments. That confusion is understandable. The whole course of official conduct in South Carolina beginning with then Governor Johnston's speech when he called a special session of the Legislature in 1944 * was to evade if possible, or to violate if necessary, the express limitations of the Fourteenth and Fifteenth Amendments. It was admittedly the intention of the governor and the legislature to deprive all Negroes of their right to vote in the Democratic primary. Small wonder, then, that petitioners, fully aware of this scheme, are preoccupied with the Fourteenth and Fifteenth Amendments. We submit, however, that it is at their peril that they ignore the protection afforded *all* qualified electors by Article I, Sec. 2 of the Constitution.

We agree with petitioners that since the decision of the Civil Rights Cases, 109 U. S. 3, this Court has held that the Fourteenth and Fifteenth Amendments apply only when there is "state action." And, the courts below, relying on the decisions of this Court, found that it was the State of South Carolina, acting through petitioners, which denied respondent the right to vote. Thus respondent was entitled to, and has been afforded, the protection of the Civil War Amendments as well as the protection of Article I of the Constitution.

It cannot be denied that it is a function of the state to conduct elections for state and federal officers and the state of South Carolina, of course, performs that function. As the courts below found, in South Carolina the selection of officers of government is a two-step process with the primary the first step and the general election the second. Each

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* See Exhibit C to original Complaint, which is admitted to be accurate and correct (R. 37).

step, however, is an essential part in the process of selecting the officers of government. This is so in South Carolina whether the first step, the primary, is conducted pursuant to statutes or to the rules of a political party, and the courts below properly so held.

As the court below pointed out, when the officers of the Democratic Party

> "participate in what is a part of the state's election machinery they are electing officers of the state *de facto* if not *de jure*, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty of the people, they may not violate the fundamental principles laid down by the Constitution for its exercises."

That conclusion was required by the decision of this Court in the *Classic* case since "in fact the primary effectively controls the choice."

In other cases, this Court has recognized that it is not the symbols and trappings of officialdom which determine whether the Fourteenth and Fifteenth Amendments apply but rather whether the facts of the particular case disclose the exercise of the state's authority. For example, in *Marsh* v. *Alabama*, 326 U. S. 501, this Court held that the Fourteenth Amendment operated on the private owner of a "company town" to protect the right of freedom of speech. Labor unions, although private voluntary associations, have been held by this Court subject to the limitations of the due process clause of the Constitution when exercising power conferred by the federal government. *Steele* v. *Louisville and Nashville RR*, 323 U. S. 192, *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U. S. 210. Similarly the Fourth Circuit in *Kerr* v. *Enoch Pratt Free Library*, 149 F. (2d) 212,* held that where a corporation had invoked the power

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* Certiorari denied, 326 U. S. 721.

of the state for its creation and relied upon city funds for its operation it was in fact a state instrumentality.

As this Court declared in *Smith v. Allwright,* 321 U. S. 649, 664-665:

> "When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment. *Guinn* v. *United States,* 238 U. S. 347, 362.
>
> "The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied. *Lane* v. *Wilson,* 307 U. S. 268, 275.
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> "The privilege of membership in a party may be, as this Court said in *Grovey* v. *Townsend,* 295 U. S. 45, 55, no concern of a State. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the State makes the action of the party the action of the State."

Prior to the action of the South Carolina Legislature in repealing more than 150 statutes governing the conduct of the primary in that state there was no doubt that under the

decision in *Smith* v. *Allwright, supra,* respondent had a right to participate in the Democratic primary. The court below expressly found that in fact the relationship between the Democratic primary and the process of the selection of the officers of government was unchanged by the repeal of the statutes (R. 103). Under these circumstances, we submit, petitioners continued to exercise the power of the state in carrying on the election of representatives. In so doing they were bound by the limitations of the Fourteenth and Fifteenth Amendments and in accordance with the decisions of this Court the courts below properly so held.

Petitioners claim that the decision of the court below is inconsistent with that of the Fifth Circuit in *Chapman* v. *King,* 154 F. (2d) 460. In that case, relying on *Smith* v. *Allwright, supra,* the court upheld the right of a Negro voter to participate in the Georgia Democratic primary. At most it can be said that there is dicta in the opinion in *Chapman* v. *King,* 154 F. (2d) 460, 463, which is inconsistent with the decision of the court below in the instant case. When a decision is consistent with the decisions of this Court a difference in dicta in the opinion of another Circuit Court of Appeals is not, we submit, ground for granting a writ of certiorari. Particularly is that true when, as here, the decisions of the two courts are consistent with each other and the rulings of this Court.

Similarly, the petitioners seek to bolster their plea by claiming that the court below has decided an important question of "local law" in a way probably in conflict with applicable local decisions. The court below construed and applied the relevant provisions of the Federal Constitution and statutes. By definition the limitations of the Constitution of the United States are not "local" in character. Therefore *Carolina National Bank of Columbia* v. *State,* 38 S. E. 629, has no application. It is for the federal courts, not the Supreme Court of South Carolina, to decide whether there has been "state action" within the meaning of the Fourteenth Amendment. We submit that it has already

been demonstrated that the decision of the court below was consistent with the decisions of this Court in that regard.

Petitioners also contend that the decision of the Court below interferes with their right peaceably to assemble and thus contravenes the First Amendment to the Constitution. This contention is as spurious as it is novel. The actual "right" which petitioners assert is the absolute authority to deprive Negroes in South Carolina of the effective exercise of their "right to choose members of the House of Representatives." The record in this case shows plainly that in conducting the primary election in the State of South Carolina the Democratic Party is not a group of individual citizens assembling peaceably to secure redress for grievances. It is an organization carrying on a part of the function of the state government to select representatives and senators to sit in the Congress of the United States and it is to that activity to which the court below applied the Constitutional limitations. In any event, petitioners' right to assemble cannot be so exercised so to deprive respondent of his right to vote and this Court so held in *Smith* v. *Allwright, supra.*

CONCLUSION

In *Lane* v. *Wilson,* 307 U. S. 268, 275, this Court pointedly declared that the Fifteenth Amendment nullifies "sophisticated as well as simple-minded modes of discrimination." Characterization of the South Carolina device to achieve the disfranchisement of Negroes seems hardly necessary. The record in this case shows plainly and without contradiction that the processes of that state have been subverted to achieve a result forbidden by the Constitution of the United States. Both the District Court and the Circuit Court of Appeals recognized this and so held. That decision is consistent with the applicable decisions of this Court. We submit, therefore, that no grounds exist here to warrant issu-

ance of a writ of certiorari by this Court and we urge denial of the petition.

Respectfully submitted,

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